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NO. 2450

United States
Circuit Court of Appeals
For the Ninth Circuit

NELLIE M. RININGER and HELEN DOROTHY RININGER, a Minor, by A. S. Kerry, Her Guardian,

Plaintiffs in Error,

vs.

PUGET SOUND ELECTRIC RAILWAY COMPANY, a Corporataion,

Defendant in Error.

Brief of Plaintiffs in Error

H. H. A. HASTINGS,
L. B. STEDMAN,
Attorneys for Plaintiff in Error.

Seattle, Wash.

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STATEMENT OF THE CASE.

This action was instituted in the Superior Court of King County, Washington, by Nellie M. Rininger, the surviving widow, and Helen Dorothy Rininger, a minor and the only child of Dr. E. M. Rininger, deceased, (the last plaintiff appearing by her legal guardian, A. S. Kerry), against the Puget Sound Electric Railway Company, a corporation created under the laws of the State of New Jersey and therefore a citizen and resident of that state, and the Puget Sound Traction, Light & Power Company, a corporation created under the laws of the State of Massachusetts and therefore a citizen and resident of that state, seeking to recover compensatory damages on account of the death of said Dr. E. M. Rininger caused by the negligent acts and conduct of said defendants. In due time defendant properly removed said cause to the Federal Court (Sup. Rec. 9), and thereafter the plaintiffs in error were permitted to file an amended complaint (Rec. 2) in which it is alleged that the de-

fendants in error own and operate an electric interurban railway running between Seattle and Tacoma, in Washington, and that Dr. E. M. Rininger lost his life while attempting to cross the tracks of the defendants in an automobile at a public thoroughfare crossing at Riverton in Washington. and further alleging that said railroad tracks were negligently and carelessly constructed and maintained, and that the interurban car which struck the automobile of the deceased was negligently operated by the defendants in this, it was run at an excessive rate of speed for that locality and that no warnings were given by the train crew or otherwise of the approach of the electric car and that the deceased was free from fault or negligence; that he was 42 years of age and was an exceptionally skilled surgeon and physician with a large and lucrative practice in the Pacific Northwest, and was earning in his practice an annual income of $60,000 to $75,000; and asking for judgment for $300,000. Each of the defendants answered separately, denied all acts of negligence and further alleged contributory negligence and carelessness on the part of the deceased and his chauffeur, who was driving the automobile. A reply denied any fault or carelessness on the part of the deceased or his chauffeur. The cause was tried before a jury, where as usual there was much conflict in the testimony with an attempt on the part of defendant in error to discredit the testimony of eye witnesses by some absurd hypothetical expert evidence, but we believe that a fair

statement of the pleadings and evidence disclosed the following facts and conditions.

Seattle is a city which in 1912 had a population of 240,000 people. About 32 miles south of which is the city of Tacoma. There is only one main street or highway leading south from Seattle (Rec. 24-77-160), and it passes through the suburbs of the last city and through White River Valley and the several towns therein to Tacoma (Rec. 24-38). The defendant in error, Puget Sound Electric Railway Company owns and operates an electric interurban line between the two cities above mentioned, and at a point approximately two miles from the south limits of Seattle, its roadbed crosses the Duwamish River, passes a point called Quarry and at a distance of 1500 feet therefrom it passes another point called Allentown, and farther along and at a distance of approximately 1200 feet it passes Riverton, and then passes toward the City of Tacoma. From Seattle over the route above described, and for some distance south of Riverton the roadbed is double tracked, and at Riverton these tracks cross this main street or thoroughfare (Exhibit 10). At a distance of about 300 feet southwesterly from this crossing, the highway, which is macadamized, runs northerly toward Seattle and descends toward the crossing at about a 4 per cent grade (Rec. 25, Exhibit 1) and when it reaches within 15 or 20 feet of the track, it runs on a level across the tracks, where it turns abruptly north and parallels the tracks until it reaches the Allentown bridge, and

there the highway diverges eastward across the Duwamish River. From Quarry to Riverton the tracks are constructed at the foot of and on a curve into a bluff. This bluff which is over 1200 feet long is excavated at its base, thereby forming a steep and nearly perpendicular bank on the west side of the tracks about 44 feet high until it approaches within 120 feet of the highway at Riverton, when it gradually recedes and disappears at the highway. (Exhibit 2.) About 10 feet west of the west rail at Riverton and 17 feet north of the center of the highway, the defendant in error has erected an iron post approximately 12 feet high, upon which is an electric alarm gong about 12 inches in diameter, and on top of this are a series of five red electric lights. There is also on this post a large railroad crossing sign. At a point about 1220 feet north of the crossing and on the west rail is an electric mechanism so constructed that a southbound car cuts in the current and ordinarily sets the gong to ringing and lights the red electric lamps (Record 26). This is for the purpose of warning travelers about to cross these tracks of the approach of a southbound car or train. The gong remains in action until after the car or train has passed the station at Riverton, where at a point 20 feet south is another electric mechanism that cuts out the current from the gong and lights, whereupon the gong ceases to ring and the lights become dark. A similar mechanism is constructed on the east rail but in *vice versa* position, being

operated similarly by northbound cars. (Rec. 26.)

Under usual conditions this gong when in proper operation could be heard 700 to 800 feet, although one witness testified that in a clear day one could hear it 1200 to 1500 feet. (Rec. 153.) The ground north of the highway and west of the electric tracks formed the bluff above referred to and at a distance of 50 feet north of the highway the bluff is 18.6 feet above the tracks. The curvature of the bank along the west side of the electric right of way from Quarry to Riverton has the effect of deflecting the sounds and warnings of southbound cars toward the east, and in consequence it was and is difficult for one at or near the Riverton crossing to hear the rumble or sounds of a southbound car until it was practically at the crossing. (Rec. 67-80-81-154.) One standing on the Riverton crossing and looking northward could see an approaching car on the tracks all the way between the crossing and Allentown and for some distance north of that point (Exhibit 2), but at various points west of the tracks, but on the highway one could plainly see both tracks at Allentown and unless familiar with the conditions would assume that they would be able to see a car all the way between Allentown and this crossing, but as a matter of fact the car, after leaving Allentown and following the west track around the curve into the bank, would entirely disappear from view and would not be seen again until it was within 40 to 50 feet of the crossing. (Rec. 68, Exhibit 7.) The trolley poles fol-

lowing the curve of the tracks increased the difficulty of seeing an approaching car. This condition was conceded by the witnesses for both parties, but there is a variation in the testimony as to how far west of the crossing would one be before this condition would arise. Scott Malone, a deputy sheriff, and a witness for the plaintiff in error, testified that this point was 50 feet west of the track. The fact that this curved bank deflected the sound of a passing car eastward away from the tracks and retarded such sounds from reaching the Riverton crossing and also that a southbound car though plainly visible at Allentown would disappear from view shortly after leaving Allentown to one who was in the highway until within 50 feet of the crossing was not readily discernible to one casually passing by.

At that time there was a large amount of traffic over this crossing, it being the principal thoroughfare leading south from Seattle, which traffic was so heavy that at times it was almost continuous (Record 78-160). There is a small passenger station on the east side and a freight station on the west side of the tracks at this crossing and about 70 feet west of the tracks was a store building and store operated by Mr. Rosenberg (Exhibit 10). There was also near by a meat market, two other grocery stores and a machine shop, and another store across the river; also quite a settlement in the near vicinity. (Rec. 100.)

This highway, for several miles on either side

of this crossing, was macadamized, for a width of 14 or 15 feet except between the crossing and the Allentown bridge, and that portion contiguous to and west of the tracks had been resurfaced a few weeks previous to the accident by having been covered with a coating of hot tar, or asphaltum, and then covered with rock screenings to absorb the tar (Rec. 188). The heat of the sun, at different places, softened this composition, causing the tar to ooze up to the surface, and it was necessary to add additional rock screenings on such soft places from time to time until all of the tar was absorbed (Rec. 149-190).

The Rosenberg store, above mentioned, was on the south side of the highway, and as the ground at that point was several feet lower than the highway, the building stood above the ground with a platform open underneath leading from the building to the street (Exhibit 1).

Dr. Rininger owned a Stearns automobile, which weighed between 4,500 to 5,000 pounds, without passengers (Record 151). Kent Brodnix was his chauffeur, and this chauffeur had driven six or seven times over this crossing prior to the accident (Rec. 51), but had not become familiar with the physical difficulties pertaining to hearing the sound of, or seeing, an approaching southbound car (Rec. 47-48-52-106), and there was no evidence that Dr. Rininger knew these conditions. Shortly after four o'clock in the afternoon of July 25, 1912, Dr. Rininger and his chauffeur, the Doctor's sister, now

Mrs. Lyford, and a nurse, Miss Davis, were on their way from Kent to Seattle along this highway, and when they reached the top of the grade about 300 feet west of the tracks at this crossing, they were traveling at a rate of 15 to 16 miles per hour, with the chauffeur in charge of the automobile (Rec. 44, 46). At this point, the chauffeur released the clutch of his engine, and permitted the automobile to coast down hill toward the crossing under its own weight, but gradually diminished its speed, and as the automobile approached the crossing, both the chauffeur and Dr. Rininger looked both ways along the track and listened to ascertain if a car were approaching from either direction (Record 44). Dr. Rininger was sitting in one of the front seats beside the chauffeur and before reaching Riverton had been turned partly around engaging in conversation with the ladies who were seated in the rear seats. After the auto began to descend toward the crossing Dr. Rininger turned around and gave attention to ascertain if any car or trains were approaching (Rec. 44-49-50). The speed of the auto was decreasing (Rec. 53-143). The automobile had pneumatic tires, and as it coasted made very little noise. They heard no whistle or alarm or sounds from any approaching car. The electric alarm gong on the post did not ring, and when they were within about 55 feet of the track the chauffeur, again looked northward, and while he could see the railroad tracks at Allentown and a short distance south of it, he could not

see any approaching car, nor could Dr. Rininger, who then directed the chauffeur to continue. When they were within about 40 feet of the track, they were then running about 12 miles an hour (Rec. 53), and a moment later when they were within 25 to 30 feet of the track the chauffeur saw a southbound electric car approaching very rapidly, from 100 to 150 feet away (Rec. 45-53). This electric car was running about 35 miles per hour (Rec. 90-126-155-201). He at once applied his brakes, which were set so tightly that the automobile skidded and came to a stop just before reaching the track, in a slightly diagonal position to it, looking northward. The approaching car struck the right spring or goose neck of the automobile, and with such force as to throw out its occupants, excepting the chauffeur, and the Doctor was thrown under the wheels of the car and instantly killed. His sister was thrown onto the track, and the nurse, Miss Davis, was thrown across the track, and was so injured that she died therefrom (Rec. 93). The hearing and eyesight of both the chauffeur and Dr. Rininger was good (Rec. 50-105).

There was no watchman or gates at the crossing (Record 49), and the only means provided by the defendant in error to warn travelers of the approach of trains, other than signals given by the train itself, were the electric gong and the red electric lights. This gong did not always operate (Rec. 226-234). Two classes of trains were operated by the defendant in error, one called "the local," which

stopped at the various stations between Seattle and Tacoma, and the other "the limited," which made no stops and ran at a high rate of speed, and it was the "limited" which collided with the automobile.

It was shown that Dr. Rininger had a large, lucrative practice as a surgeon and physician. That his earnings from his practice for the year 1910 was $57,168.00, and for the year 1911 it was $56,-518.15, and for the year 1912 prior to July 25th it was $38,418.00, or at the rate of $67,425.00 per annum (Rec. 97), and that he was 42 years of age at the time of his death and that his life expectancy was 26 1-3 years (Rec. 106).

During the trial Mrs. Rininger, one of the plaintiffs, was called as a witness by the defendant in error and the following question was propounded to her:

"I wish you would state what the estate amounted to which you and your daughter received." This was objected to as irrelevant, incompetent and immaterial. The objection was overruled and an exception allowed (Rec. 225), whereupon the witness answered in substance that she and her daughter received from the estate of Dr. Rininger mortgage notes for $60,000, being the balance due from the sale of the hospital; also $5,437.00 in cash and the uncollected book accounts of about $30,000.00.

During the examination of Mr. Brodnix, the chauffeur, he was asked the following questions: "You may state, if you know, what would be a

reasonable rate of speed to approach a crossing similar to this with an automobile of the weight of this automobile with the number of passengers in it that you had at the time." This was objected to on the ground that was the question for the jury to determine, which objection was sustained (Rec. 47). It was expected to prove by this witness that 12 miles per hour was a reasonable rate of speed to approach this crossing under the conditions named.

H. D. Hanford was called as a witness for the plaintiff in error, and stated that he was a civil engineer and had been for 18 years, and had resided in Seattle more or less since October, 1899; that he was the chief engineer in charge of the work of the construction of the Puget Sound Electric Railway and had general knowledge of the Riverton crossing. He was asked the following questions: "Was there any discussion at the time of the location and building of those tracks between you and the officers of the company respecting the character of this crossing whether or not as located it was or would be a dangerous crossing?" Also the following: "Do you know whether or not there was a plan considered at the time these tracks were laid out and constructed across this crossing by which a different method of construction of tracks could have been carried out and thereby reduced the danger to the traveling public in crossing those these questions were objected to as irrelevant and immaterial, which objections were sustained (Rec.

102). It was expected that the answers to these questions would disclose that at the time the crossing was built its dangerous character to the traveling public was recognized and considered by the witness and the officers of the company and that the witness proposed a reasonable plan for laying out the road at that point that would have greatly reduced, if not eliminated, the danger to the traveling public on account of the crossing, but was not adopted because such plan would have increased the cost of construction of the railroad at that point.

After the plaintiffs in error had rested their case, the Puget Sound Traction, Light & Power Company moved the court for an order withdrawing the case from the jury and directing a non-suit in its favor upon the ground that no evidence had been offered that connected the said defendant with the owning, operation or management of the railroad causing the death of Dr. Rininger, and that no negligence on its part had been shown. This motion was granted (Rec. 107). Thereupon the other defendant in error herein, moved that the case be withdrawn from the consideration of the jury and a judgment of non-suit be directed, that no negligence had been shown or proven against it and for the further reason that it affirmatively appeared from the plaintiffs' testimony that Dr. Rininger and his chauffeur, who was in charge of the automobile when the doctor was killed, were guilty of contributory negligence. This motion was denied, the court ruling that so far as the evidence concerning the

negligence on the part of the defendant in error, there was sufficient evidence of such negligence to go to the jury; that contributory negligence was a matter of defense and that a motion should be made at the closing of the case for a directed verdict (Record 107). After the defendant in error introduced its testimony and the rebuttal testimony on behalf of plaintiff in error submitted, and all parties had rested, the defendant in error being the only remaining defendant in the case moved that the jury be instructed to return a verdict in favor of it and against the plaintiffs in error, upon the ground that the testimony failed to show any negligence on the party of the defendant company, and that it affirmatively appeared from all of the testimony that Dr. Rininger and the chauffeur in charge of the automobile were guilty of such contributory negligence as to bar a recovery (Rec. 243). After argument, the trial court was of the opinion that Dr. Rininger and his chauffeur were guilty of contributory negligence, in this, that when they looked and listened in the moving automobile to ascertain if there was an approaching car from either direction, that they did not bring the automobile to a full stop, and that they approached the railroad crossing at a dangerous rate of speed sufficient to bar a recovery (Rec. 244-250). Whereupon said motion was granted, to which ruling an exception was allowed and the court thereupon instructed the jury that as a matter of law the plaintiffs in error could not recover, and directed the jury to return

a verdict in favor of the defendant in error, to which instruction an exception was allowed, and thereupon a verdict under the direction of the court was rendered in favor of the defendant in error and filed (Rec. 253). Thereafter a judgment was rendered and ordered against the plaintiffs in error dismissing the action and in favor of defendant in error for costs. Thereupon plaintiffs in error sued out a writ of error to review the action of the trial court.

SPECIFICATIONS.

1. It was error on the part of the court to grant defendant's motion for a directed verdict in its favor, and also in instructing the jury to return a verdict for the defendant and in entering a judgment in this case in favor of the defendant. (Rec. 250)

2. It was error on the part of the court to rule as a matter of law that the deceased and his chauffeur were guilty of contributory negligence in not stopping the auto and looking and listening to ascertain if a car was approaching the highway, and also in determining as a matter of law that the deceased and his chauffeur approached the crossing at an unreasonable rate of speed, and that they approached the crossing at a dangerous rate of speed. (Rec.

3. It was error on the part of the court to refuse to submit to the jury for their determination the issues in this case, and in determining as a matter of law that the deceased and his chauffeur approached the railroad tracks of the defendant at Riverton at a dangerous rate of speed and that

there was no issue that should have been submitted to the jury, and also in refusing to submit to the jury the question whether or not the deceased and his chauffeur were exercising reasonable care and diligence is ascertaining if there was any danger as they approached this crossing. (Rec. 248)

4. The court should not have permitted the following question to be asked the plaintiff, Mrs. Rininger, to-wit: "I wish you would state what the estate amounted to which you and your daughter received" and in requiring her to answer this under objections; the substance of the answer was "that the plaintiffs received $60,000.00 in notes and mortgages from the sale of some property and uncollected bank accounts amounting to $30,000, and that she herself received $5,437.00 cash." (Record 225.)

5. The court should have permitted the following question propounded to Brodnix, "You may state if you know, what would be a reasonable rate of speed to approach a crossing similar to this in an auto of the weight of this auto with the number of passengers in it that you had at that time?" to be answered; the substance of the answer would have shown that twelve miles per hour was not an unreasonable rate of speed (Record 47).

6. The court should have permitted the witness Hanford to answer the following question: "Do you know, Mr. Hanford, from your knowledge as an engineer and also the experience that you had in laying out this track, whether or not the crossing

there could have been constructed so as to have eliminated or at least greatly reduced the danger of this highway crossing?" the answer would have shown that there was another and reasonable method of laying out and constructing said tracks at the Riverton crossing at a reasonable expense that would have greatly reduced the dangerous character of this crossing, and that the same was discussed by the witness, who was the chief constructing engineer, with the executive officers of the company that built the tracks (Record 103).

ARGUMENT.

Our chief grievance in this case was the action of the trial court in granting a motion for a directed verdict against the plaintiffs in error and in directing the jury to return a verdict for the defendant in in error and rendering a judgment for defendant in error based on such verdict.

This is our first specification which embraces our first, seventh and eighth assignment of errors.

In our second specification we challenge the correctness of the reasons assigned by the trial court in so directing a verdict for the defendant in error and rendering judgment therein, and this embraces our third, fourth and sixth assignments of errors.

Our third specification seeks for review the refusal of the court to submit to the jury for their determination the issues between the parties hereto and this embraces our second and fifth assignments of error.

As a matter of fact the solution or determination of all of said specifications and the assignment of errors embraced therein depend upon the disposal of one general question and that is: Did the trial court err in directing that the evidence showed as a matter of law that the deceased was guilty of such contributory negligence, that was the proximate cause of his death, that barred the plaintiffs in error of any right of recovery, and as the disposal of such question alone will dispose of our first four specifications and our first eight assignments of errors, it becomes logical to treat all of them as one consolidated specification in our discussion.

No recovery could be had by the plaintiffs in error unless the defendant in error was guilty of negligence that caused the death of Dr. Rininger.

Inasmuch as the court announced in his ruling on defendants' motion for a non-suit that there was sufficient evidence of negligence on the part of the defendant that contributed to the collision, to warrant submitting this branch of the case to the jury (Rec. 107), we will not give much attention to this phase of the question other than what necessarily appears in the argument as we proceed, except to call attention to the fact that a large amount of travel passed over the Riverton crossing. As Seattle is bounded on the west by the waters of Puget Sound and on the east by the waters of Lake Washington, all vehicle traffic to or from the city must be from the north or south. Because of this and also because of the topography of the territory ad-

joining the south limits of Seattle, there is but this one main arterial highway leading south from the city through the White River Valley, and the numerous towns therein to Tacoma (Record 24-25-49). There was also quite a settlement around and in the vicinity of this crossing (Rec. 100), all of which served to develop a stream of traffic so great that during the day there were vehicles passing nearly all the time (Rec. 78-155), and one of the witnesses for defendants testified that he saw so many narrow escapes which were almost daily between autos and the cars on this track that he had a dread when he heard the gong ringing and saw autos attempting to cross these tracks (Rec. 160). There was a right angle turn of the highway and on the east side of the crossing and the view of approaching southbound cars was obscured to travelers from the west until they were within 40 feet of the tracks, and the noise of approaching cars was difficult to hear (Record 48), and yet the defendant in error operated its "Limited" cars over this crossing during the day time at a speed of 30 to 40 miles per hour, and at the time of the fatal accident, no gates, guards or flagman were maintained at the crossing to warn travelers of the danger of approaching swiftly moving cars or trains (Record 48).

The failure to maintain a flagman or gates at this crossing to warn travelers of the approach of the limited southbound cars, was negligence or at least the existence of these conditions was sufficient evidence to warrant the jury in finding that the de-

fendant in error was negligent in failing to maintain such flagman or gates.

Grand Trunk Railroad vs. Ives, 144 U. S. 408.

Continental Improvement Co. vs. Stead, 95 U. S. 161.

Kowalski vs. Chicago G. W. Ry. Co., 84 Fed. 586.

Kowalski vs. Chicago G. W. Ry. Co., 92 Fed. 310.

Chesapeake & O. Ry. Co. vs. Steele, 84 Fed. 93.

Penn. Ry. Co. vs. Miller, 99 Fed. 529.

Burns vs. North Chicago Rolling Mill Co., 27 N. W. R. 43.

Thomas vs. The Delaware Lackawanna & Westery Ry. Co., 8 Fed. 729.

Kenyon vs. Chicago Northwestern Ry. Co., 96 A. St. Rep. 382.

Delaware and H. Ry. Co. vs. Larnard, 161 Fed. 520.

Chicago & I. Ry. Co. vs. Lane, 22 N. E. R. 513.

Simonson vs. M., St. P. S. S. M. Ry., 135 N. W. R. 745.

T. & P. Ry. vs. Cody, 166 U. S. 606.

Recognizing the dangerous character of this crossing, the defendant in error had installed an electric gong which the approaching car set to ringing to warn travelers that cars were about to cross this thoroughfare (Record 26, Exhibit 10), but this

gong did not always operate or ring when it should (Rec. 227-234), and six witnesses who saw this collision testified that this gong did not ring as the colliding car came to the crossing (Rec. 45-49-56-64-74-79-90-94). Furthermore, the two occupants of the damaged automobile who testified stated that they heard no signals, whistles or noise of the approaching car and one of them was the chauffeur who was listening therefor (Rec. 94, 99). Two others who were near the tracks for several minutes at and before the collision stated that no whistles or other signals from the operating car was given (Rec. 64-74). Another witness who was familiar with the crossing and was approaching it from behind this auto stated, that there was no whistles or noise from this car (Rec. 79), and another witness who was standing on the passenger platform at the crossing and who saw the car as it left Allentown and until it reached the crossing, stated it did not blow any whistles or give any other alarm signal of its approach (Rec. 90). The failure of this gong to operate or the train crew to blow a whistle or to give them some alarm signal as it approached the crossing was negligence on the part of defendant in error in operating this car. Hence the evidence of the defendant in error's negligence was complete.

After reading the expressions of the trial court in granting the motion of defendant in error for an instructed verdict in its favor, one reaches the conclusion that it was the opinion of the court that Dr. Rininger or his chauffeur should have stopped the

automobile and listened for sounds of an approaching car, and for this reason they did not exercise reasonable precaution in approaching said crossing to ascertain if there was any apparent danger in crossing the tracks at that time.

The rule that is now adopted, governing the question whether one injured at a railway crossing is guilty of such contributory negligence as will bar him or his representatives from recovery, is tersely stated as follows:

Was the deceased at the time of the fatal accident, under all the circumstances of the case in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful man under similar circumstances?

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408.
Flanmelly vs. Delaware & Hudson Ry. Co., 225 U. S. 601.
Cincinnati Ry. Co. vs. Farra, 66 Fed. 496.
L. & N. Ry. Co. vs. Summers, 125 Fed. 719.
D. L. & W. R. Ry. vs. Devore, 122 Fed. 791.

It may be stated that one about to cross railroad tracks at a lawful place must use his senses of sight and hearing in making a reasonable effort to ascertain if he may safely proceed. In other words, he must look and listen in a reasonable place and manner relatively to said crossing to a reasonable degree to determine whether his safety is imperiled. There is no fixed rule that he must stop some distance before raching the track and look and listen for evidences of danger before proceeding.

Whether one should come to a halt and then exercise the senses depends upon all of the surrounding conditions and the known dangers to the traveler.

In the case of *Grand Trunk Ry. Co. vs. Ives, supra,* one Elijah Smith was driving into the city of Detroit in a covered buggy over a route that he had traveled daily many years. This road had much travel and crossed the tracks of the railroad company obliquely. For a distance of three hundred feet along the right side of the road going to the city there were obstructions to the view of the railroad consisting of houses, barn, outbuildings, an orchard, trees and shrubbery, so that a traveler must be within fifteen feet of the track or his horse within eight feet before he could get an unobstructed view of the track. Mr. Smith stopped his horse some distance before he could get a clear view of the track, and looked and listened for approaching trains. He then drove on but did not stop again after he had reached the point where he had a clear view of the tracks. He saw other trains passing on a further track and its noise prevented him from hearing a train approaching on the near track. He drove upon the crossing and was killed by the near train approaching from the right. In an action to recover damages for his death the railroad company relied upon the defense of contributory negligence of the deceased in failing to stop when he knew he had reached a point where he could see the tracks both ways and then look and listen for danger, for had he done so he would readily have

seen the train and avoided it. And further contended that the court should as a matter of law have so determined and instructed the jury to return a verdict for the company. The trial court submitted the question to the jury for it to determine whether under all the circumstances the deceased was negligent.

The railway company asked the court to give the following instruction:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train, that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

"This instruction was refused on the ground that it is too much upon the weight of the evidence and confines the jury to the particular circumstances narrated without notice of others that they may think important."

Justice Lamar in his masterful review of the cases bearing on the subject, says: "The determination of what was such contributory negligence on the part of the deceased as would defeat this action

or perhaps more accurately speaking the question whether the deceased at the time of the fatal accident was under all the circumstances of the case in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances was no more a question of law for the court than was the question of negligence on the part of the defendant," and in affirming the refusal to give the quoted instruction says, "In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* of the facts and circumstances bearing upon the question and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others."

Another instructive case is found in *New York, S. & W. Ry. Co. vs. Moore*, 105 Fed. 725, where it appears that the plaintiff was proceeding along the highway which led across the tracks of the defendant in the village of Unionville, N. Y. He was driving a pair of horses attached to a milk wagon, approaching the crossing from the west. The railroad at that point ran north and south, intersecting the highway at right angles, but at a short distance south of the crossing the railroad curved sharply to the eastward. Approaching the crossing from the west, the view of the railroad to the southward was obscured for a considerable distance. Near the tracks, obstructing the southerly view, was a store building and between it and the

main tracks was a switch track upon which stood a box car on the west side of the tracks at the time of the accident. The plaintiff was proceeding along at about 9 o'clock in the forenoon on a clear day and was looking and listening for any passing trains but did not stop for that purpose. Not hearing any trains, although he knew one was due at that time, he proceeded to cross the tracks and was struck by a fast passenger train coming from the south. The plaintiff was familiar with the surrounding conditions. There was conflicting testimony as to whether the approaching train blew any warning whistles. Upon the trial the railroad company urged the trial court to direct a verdict for it upon the ground that as a matter of law the plaintiff was guilty of contributory negligence which barred his recovery. The court refused to do this, but submitted the question to the jury, which found for the plaintiff. In affirming the action of the lower court, Judge Wallace says, "If the jury believed the testimony on behalf of the plaintiff, the approaching train, because of the obstructions in the way, could not be seen by him until his horses were practically upon the track when it was too late to escape a collision, and he could only discover its approach by his sense of hearing. If his testimony was true, he used all his faculties diligently and did everything that any prudent man would have been likely to do while crossing the track unless he should have stopped his horses to listen more perfectly. His testimony may be incredible and it

may seem unaccountable that he did not hear the noise of the approaching train, but the jury were at liberty to credit his narrative. In approaching a railroad crossing the injured party is not to be deemed guilty of contributory negligence because he did not exercise the greatest degree of diligence which he could have exercised, but only if he fails to exercise such care as a prudent man approaching such a place would. Whether he ought to stop in a given case is a question for the jury to decide in view of the circumstances developed."

We call the court's attention to the case of *C. N. O. & T. P. Ry. Co. vs. Farra,* from the Sixth Circuit, reported in 66 Federal 496. The plaintiff, a woman, was driving a horse and buggy along a country road that intersected the track of the defendant; with her were her two small children, one a babe on her lap. The horse was gentle. Both highway and track approached the crossing through considerable cuts. The course of the highway was a heavy descending grade to the track. The railroad approached the crossing on a curve through a deep cut. An approaching train could not be seen by the approaching traveler until they were within a few feet of the track, all of which was well known to the plaintiff, who admitted that she knew that it was a dangerous crossing. The plaintiff drove down the highway toward the track, looking and listening for any indication of an approaching train, but did not stop her horse. Not discovering any indication of an approaching train she continued to drive across

the track, where she was struck by a train and injured. The evidence was conflicting as to whether any whistle was blown by the engineer. Upon the trial the defendant requested an instruction from the court to the effect that under the conditions in this case it was the duty of the plaintiff to have stopped her horse before crossing the track and looked and listened for a train. This instruction was refused, but the court did in substance state to the jury that it was for them to say whether the plaintiff exercised such care and such prudence under the circumstances as a careful and prudent person should have done. The jury found for the plaintiff. Judge Lurton in the opinion affirming the action of the lower court after referring to the case of *Grand Trunk R. vs. Ives, supra,* and also referring to the contention of the railroad company that the noise of the plaintiff's vehicle as she drove along interfered with her hearing and had she stopped, her hearing would have been more acute, uses this language. "The fundamental rule concerning the care to be exercised at a public railroad crossing by a traveler is that he must exercise that degree of caution usually exercised by prudent persons conscious of the danger to which they are exposed at such crossing. The Pennsylvania rule which seems to make it the duty to stop under all circumstances regardless of obstructions to the view or obstacles to the hearing has never met with general acceptance, and seems much calculated to condone carelessness and recklessness by railroad companies at

public crossings where the rights and duties of the public and of the company are reciprocal, neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances as in the Ives case and in the case at bar where the duty is debatable and proper for the consideration of the jury."

In another case we have the following facts: A young man was driving a team of horses hitched to a lumber wagon on a highway leading across railroad tracks where there were obstructions interfering with the view of approaching trains. His team was going on a jog trot. The wagon was old and made considerable noise. He was familiar with the crossing and was looking and listening for trains, but did not stop his team for that purpose. While going across the track he was struck by a train and injured. Upon the trial contributory negligence was the defense relied upon. The company contending that the plaintiff should have stopped his team (which was under a slow trot) looked and listened. From a verdict and judgment for the plaintiff the defendant appealed. The Supreme Court of Illinois say in affirming the judgment: "The duty of a person approaching a railroad crossing with a wagon and team, even when such wagon is old and makes considerable noise, and when he knows there are obstructions, which to some extent interfere with the view of an approaching train and also knows a train is due

about that time, to bring his team to a full stop before driving upon the railroad track, is not so absolute and unqualified as that a court can say as a matter of law and regardless of all other attendant circumstances that such person is guilty of a want of ordinary care in failing so to do. It is for the jury to determine from all the facts and circumstances in proof whether or not there was negligence."

Chicago & Iowa Ry. Co. vs. Lane, 22 N. E. 513.

A case that is frequently referred to approvingly embraces these facts: The plaintiff was driving away from a village with a team hitched to a farm wagon over a frozen highway that led across a railroad crossing. He could not see a train coming from the north by reason of a cut and intervening obstacles. As he drove along he looked and listened for trains, but his wagon produced much noise over the frozen ground and his hearing was somewhat impaired. He did not stop his team before crossing the track. He failed to discover an approaching train and was struck and injured by it. Upon the trial counsel for the railroad company requested an instruction to the effect that if one is approaching a known dangerous railroad crossing and if by reason of the character of the ground or other obstructions or defect in sight or hearing he cannot determine with certainty whether a train is approaching without stopping, looking and listening, then it is his duty to do so and

if he fails to do so and is injured he cannot recover. The Supreme Court of the United States refused to adopt such a rule but did say "both parties are charged with the mutual duty of keeping careful lookout for danger and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

Continental Improvement Co. vs. Stead, 95 U. S. 161.

A strong illustrative case is found in *C. & N. W. Ry. vs. Netolicky*, 67 Fed. 665. A few miles south of Cedar Rapids, Iowa, the main thoroughfare leading to that city crosses a railroad track. This crossing was more or less dangerous because of the large number of vehicles passing over it daily. On account of obstructions the view of approaching trains from the east was obscured for some distance. At times these obstructions interfered with the noise from approaching trains, making it difficult to hear them. The deceased was driving along this highway, which was frozen, toward the crossing with a team and empty wagon with a rack for hauling wood on it. As he attempted to cross the tracks he was struck and killed by a train from the east. He was trotting his team until he neared the crossing, but did not stop and his wagon made considerable noise in passing over the frozen ground. The trial court was requested to direct a verdict for the railroad com-

pany on the ground that it was obvious that the deceased was guilty of contributory negligence because he did not take reasonable precautions to ascertain the danger of the approaching train by stopping and listening before driving onto the track. This was refused, but the question of the deceased's negligence was submitted to the jury, which found for the plaintiff. In disposing of this contention the Circuit Court of Appeals say: "It does not occur to us that the mere fact of his near approach to the track before discovering the train was in itself a circumstance which conclusively established a want of ordinary care. The conditions surrounding him were such that it is by no means improbable that he may have been exercising his sense of hearing and his other faculties with as much diligence as the law exacts." The Court further declared that there was no error in submitting the question to the jury.

In the case of *St. L. & S. F. Ry. Co. vs. Barker*, 77 Fed. 810, plaintiff was driving an ox team attached to a wagon over a country road toward a dangerous crossing. The view of a train from the north was obscured by a pile of railroad ties, and further on by a cut, but when one was within 12 or 16 feet of the track, he could then get a clear view. The plaintiff listened and looked for trains while proceeding but did not stop to do so. There was more or less noise from his wagon. He discovered an approaching train from the north when too near the track to avoid it and was injured. Again the rail-

road company requested an instructed verdict in its favor on the ground that the failure of the plaintiff to stop at a point where he knew he had a clear view of this track and look and listen for trains was, as a matter of law, contributory negligence sufficient to prevent his recovery. This was refused. On writ of error the principal contention was that the plaintiff should have stopped his team and looked and listened, and that because he failed to take these precautions he was, as a matter of law, guilty of contributory negligence. The court refused to assent to this view and say that where intervening objects obstruct the traveler's view in either direction from the crossing it is his duty to be more vigilant in listening for the sound of approaching trains, but there is no imperative rule requiring the traveler to stop and listen before crossing the tracks; that as a general rule the jury should be allowed to determine whether the conditions were such that in the exercise of reasonable care the traveler should have stopped and listened.

Where a young man trotted his team toward and upon a known dangerous railroad crossing where the view of the tracks was obstructed, he looked and listened but did not stop. In discussing whether or not the trial court should have determined as a matter of law the deceased was guilty of contributory negligence, the Supreme Court of Iowa says:

"We are of the opinion that the plaintiff's

conduct should be judged in the light of all the facts and circumstances that then attended his act and from that say whether or not a reasonably prudent and cautious man having due regard for his own safety would under such facts and circumstances, have conducted himself as did the plaintiff."

Plattor vs. C. G. W. Ry., 142 N. W. R. 213.

The following cases are based upon a similar state of facts as the foregoing instances and in each case it was declared to be the province of the jury to decide whether the plaintiff in approaching the crossing with his team was exercising such care and caution for his own safety as a reasonably prudent man would do under like conditions.

Harshaw vs. St. L. I. & M. Ry., 159 S. W. R.

Dusold vs. C. & G. W. Ry., 142 N. W. R. 214.

Simonson vs. M. & St. L. Ry., 135 N. W. R. 745.

Silensky vs. P. G. W. Ry., 94 N. E. R. 272.

N. P. Ry. vs. Austin, 64 Fed. 211.

Judson vs. Ry. Co., 158 N. Y. 597.

We confidently assert that the principles announced in the foregoing cases prevail generally in all jurisdictions in this country when applied to similar state of facts.

It may be urged that travelers in automobiles are charged with greater diligence in crossing railroad tracks than those who travel by teams, but why should they be held to any higher degree of care toward railroads in crossing their tracks than

those who are in horse driven vehicles? Are the privileges or rights of motor driven vehicles any less toward railroads at highway crossings than those of animal driven vehicles? If so in what respect?

Motor driven vehicles are no longer experimental objects, nor usable only for pleasure purposes. They have become one of the most useful and standard appliances for general business and one of the most reliable means of transportation of both individuals and freight with the field for its usefulness constantly increasing, so there can be but one answer to the above query and that is that motor driven vehicles have the same rights and privileges and are subject to the same conditions when traveling on the public highways, over railroad crossings, in their relations to railroads as are animal driven vehicles.

Cases from courts of last resort bearing upon this question are few owing to the recent origin of automobiles, yet such decisions as are at hand support the above rule except two cases where the opinions were written by Judge Buffington of the Third Circuit Court.

In *Walters vs. C. M. S. S. Ry. Co.*, 133 Pacif. 357, the plaintiff was driving an auto along a public highway and on crossing the tracks of the defendant outside of the city of Anaconda was struck by a train and injured. As plaintiff approached the crossing he looked and listened from the moving auto but did not stop and listen, although his

view of the tracks was obstructed by roadway cuts. The appellant contended that under the circumstances similar to the case at bar the auto driver should stop, look and listen, and founded their claim upon the two cases referred to.

The Supreme Court of Montana refused to adopt the rule contended for, and we believe logically and successfully pointed out the weakness of Judge Buffington's reasoning, and further say, "If they (these two cases) are to be taken to hold in the absence of express statute that it is contributory negligence as a matter of law for the driver of an automobile not to stop, look and listen before using a highway crossing without regard to whether ordinary prudence would require such a course they are contrary in spirit to the rule announced by the superior authority of the Supreme Court in *G. T. Ry. vs. Ives*, and against the weight of general decision.

"The law is that one desiring to cross a railroad track must use reasonable care for his own safety. We see no reason to change these rules either for or against any class of vehicles in lawful use." (Citing twelve cases.)

So in the case of *Dickinson vs. Erie R. Co.*, 37 L. R. A. (N. S.) 150, the plaintiff was driving in an automobile towards a railroad crossing consisting of three tracks which ran east and west. His view of the tracks and of the crossing was obstructed by a high bank running parallel with the highway and also by a freight shed, and telegraph

poles near the tracks. When plaintiff was within 200 feet of the crossing he coasted down to it at a low rate of speed but looking and listening for noises of any possible approaching train. When too near the track to safely stop he discovered a swiftly moving train coming towards him. He jumped from the auto but was injured by the train. In an action brought to recover damages he was non-suited because he did not stop his auto at a safe distance and look and listen for the train. On appeal this was held to be error, the court stating the general rule relating to railway crossings, and that it was for the jury to determine whether under the circumstances the plaintiff had acted as a reasonably prudent man would act under similar circumstances.

So in a case where one drove towards and upon a railroad crossing in a noisy automobile where the view of the tracks in one direction was obscured, who looked and listened for trains but did not stop the motor nor the automobile so that he could hear more distinctly, and was killed by a train from the obscured direction, the above rules were applied, and the Supreme Court of Minnesota declared, "A court ought not to take upon itself to say that fair minded men may not conclude under all the evidence that deceased did look and listen for approaching trains as cautiously as ordinarily prudent persons would do in a like situation.

Green vs. G. N. Ry. Co., 144 N. W. R. 722.

So the Supreme Court of North Dakota in hold-

ing that there is no absolute duty for an automobile driver to stop before crossing railroad tracks say: "It cannot be said as a matter of law that a prudent person under like circumstances would have stopped. Under the better considered cases plaintiff cannot be held guilty of contributory negligence as a matter of law merely because he did not *stop* and listen before crossing the tracks." The fact that if the automobile had been stopped the occupants might have heard the approaching train was held not decisive of their negligence.

Pendroy vs. G. N. Ry., 117 N. W. R. 531.

To the same tenor are the cases of:

Lockridge vs. M. & St. L. Ry., 140 N. W. R. 234.

Adams vs. G. H. & S. A. Ry., 164 S. W. 853.

Pendroy vs. G. N. Ry., 117 N. W. R. 531.

In overruling the contention that greater care is required of automobile drivers than that of drivers of other vehicles it is said, "Many of the courts including those of our own state expressly recognize that the same rule as to care at crossing should be applied to drivers of automobiles that is applied to drivers of other vehicles."

C. L. R. Ry. vs. Wishard, 104 N. E. R. 593.

Do the rules above announced apply to this case?

In reviewing a judgment of non-suit or a directed verdict for defendant, none of the evidence of the plaintiff can be disregarded and the record

must be considered in its most favorable aspect toward the plaintiff.

The evidence was sufficient to establish the following facts: The defendant's double-tracked roadway from some point north of Allentown to the Riverton crossing, being a distance of over a quarter of a mile, was built on a westerly curve alongside of a bluff (Exhibit 10). In fact, for a portion of this distance the roadbed was excavated into the bluff, which was from 18 to 44 feet high (Exhibit 10). The southbound cars ran on the west track and the limited trains were operated at a high rate of speed. Nearly two years before this collision the defendant had installed an automatic electric alarm gong on a conspicuous post at this crossing, which was set in motion by the southbound car (Record 116). The main highway leading north from Seattle carrying a heavy and constant travel crossed these tracks at Riverton (Record 78). Leading west from the crossing this highway had an ascending grade of 4 per cent (Record 25), and was freshly covered with a pitch composition and rock screening, which softened on a hot day (Record 189). A traveler on the crossing has a clear view of both tracks from the crossing to Allentown, but when he was 50 feet west of the crossing he could see both tracks at Allentown, but he could not see an approaching car on the west track all the way between these two points, as the car would be lost to view because the curve carried it into the bank and could not be seen again by

such traveler until it was within 50 feet of the crossing (Record 68). The steep curved bank deflected all sounds from such car to the eastward so that it was difficult to hear the approaching car until it was practically at the crossing (Record 48-81). There was nothing to inform or warn the casual traveler of these unusual conditions, and they could only be discovered by a series of actual observations of an approaching southbound car, so that one not familiar with all these conditions in coming down the grade and reaching a point 50 or 60 feet west of the crossing could stop and see the tracks at Allentown and would assume that he could see any approaching car all the way between that point and the crossing, and could listen for the noise of any such car and could neither see the car because it would be obscured in the bank and not hear it because the noise of it would be deflected away and then he would feel perfectly safe in crossing the tracks. On July 25, 1912, Dr. Rininger and his chauffeur and two other occupants approached this crossing from the south. When within 300 feet the chauffeur released the engine from the clutch and the auto proceeded down grade under its own momentum (Record 44-46). Both the deceased and the chauffeur looked and listened for any indications of an approaching car (Record 44-49-60). The Doctor, who was sitting in the front seat, had been partly turned around looking backward in conversation with his sister, faced forward as they proceeded so that he could more readily use his fac-

ulties for looking and listening (Record 50-94). As it is presumed that men act for their safety, we must assume that he knew nothing of the unusual and not readily discernible physical conditions that prevented one from seeing or hearing a southbound car at this crossing.

N. P. Ry. vs. Spike, 121 Fed. 44.
C. & O. Ry. vs. Steele, 84 Fed. 93.
Thomas vs. Ry. Co., 8 Fed. 729.
Dusold vs. C. & G. W. Ry., 143 N. W. R. 214.
B. & O. Ry. vs. Landrigan, 191 U. S. 761.

The chauffeur did not know of these peculiar conditions (Record 48-106). The speed of the automobie was slackened to twelve miles per hour (Record 53-78). As they proceeded both looked both ways along the tracks (Record 52). They could see the tracks at Allentown but saw no car between it and the crossing. They listened but could hear no sounds. They heard no whistles or other alarm. The electric gong was silent and yet they were within 50 feet of it. While it is true that the engine was running, yet the chauffeur stated that the noise from it was slight and would not have prevented him from hearing the car (Record 55). Who can say that had they stopped 100 or 90, or even 60, feet west of the crossing they would have seen or heard the approaching car? Not hearing or seeing any evidence of danger they pursued their course. Did they not use reasonable precaution to ascertain the existence of any danger? Had this case been submitted to the jury

and it had returned a verdict in plaintiff's favor, it could not be successfully urged that there was no evidence to sustain such verdict. There was no flagman or gates at the crossing to warn travelers of danger (Record 49), but the defendant had been content to install an automatic gong to give such warning and when it was installed for that purpose the public had a right to place reliance upon it. While the public was not relieved of the duty to exercise caution in passing this crossing, by reason of the installing of this alarm, yet it served to relax the vigilance of the traveler.

Thompson on Negligence, 2nd Ed., 1531-1582.

Kimbal vs. Friend, 27 S. E. 901.

Dusold vs. S. & G. W. Ry., 142 N. W. R. 214.

The failure of this gong to ring at that time would be the same as if gates had been installed at the side of the crossing and were open. In such case it should be considered as an important circumstance in determining whether the duty of exercising due care by the traveler was exercised.

Dusold vs. C. & G. W. Ry., supra.

D. & H. Co. vs. Larnard, 161 Fed. 520.

Thompson, "Negigence," 2nd Sec. 1613.

No warning of its approach was given from the car itself. All of these conditions tended to allay the deceased. When they were within 25 or 30 feet of the crossing the hidden car appeared 100 feet away traveling at a speed of at least 35

miles per hour (Record 45). Then the chauffeur did everything in his power to avert disaster, set his brakes and brought the auto to a standstill, but one of the springs of the auto protruded sufficiently to catch the overhang of the electric car, which jerked and threw the auto around, thereby throwing out its occupants, causing Dr. Rininger to fall under the electric car (Record 45).

It appears to us that the evidence in the case at bar makes a stronger case for the plaintiff in error for the submission to the jury of the question of the exercise of reasonable precaution as announced in *G. P. Ry. vs. Ives, supra*, than do the facts in any of the cases heretofore referred to, and that it was error for the trial court to refuse to submit the issues to the jury.

It will be contended that the evidence of the defendant served to disprove the plaintiff's case. It is unnecessary to remind this court that it is only the jury that can determine what facts are established by disputed testimony. Nevertheless, we do not hesitate to enter into a comparison of the testimony for the respective parties. The testimony on behalf of the plaintiff as to the rate of speed of the auto was that of the chauffeur driving it, who had several years experience in operating and repairing automobiles. Also that of Mr. Lamb, another experienced auto driver who saw the moving auto; also that of Mr. East, who was driving a light delivery team just behind it. To this may be added the testimony of Mr. Rosenberg, the defendant's

star witness, who watched the auto pass and observed that it was reducing its speed (Record 148). To controvert this, a Mr. Apt, who was a farmer and whose only experience at measuring distances was in stepping spaces for fence posts, and who had no experience in running automobiles (Record 197), and who happened to look out of the car window (he being a passenger on the car) a moment before the collision, testified that he thought the auto was going as fast as the car, which was 30 to 35 miles per hour (Record 193). The defendant also relied upon the testimony of two experts who stated hypothetically that if the skid marks of the auto wheels were 39 feet long, the auto must have been going 30 to 35 miles per hour (Record 177-179). Yet one of them stated that an auto would not skid until it reached a speed of 20 miles per hour (Record 178), while the other stated that it would skid at any speed over 10 miles per hour (Record 181). Another expert in the employ of one of the defendants stated that if the skid marks were 30 feet long the auto must have been running 30 miles per hour (Record 205). This was followed up by a witness testifying that 18 months after the collision he remembered that at the time of the collision he had sighted from his window across the road to a parallel board fence, and the west end of the skid marks began at this line and just before the trial he measured it and found that it was 39½ feet from such line to the tracks (Record 150). But another of defendant's witnesses stated that the skid marks ended 13 feet

from the tracks (Rec. 194). This would make the greatest length of the skid marks 26½ feet long. A boy 14 years of age when the collision occurred, who had never driven an auto and had only ridden once or twice in one, and who saw the auto approach him head on, stated that he thought it was going 25 to 30 miles per hour (Record 168-170). An expert on the part of the plaintiff testified that the speed of an auto could not be reliably determined from the skid marks. That one could drive the same auto over the same pavement on the same day at the same rate of speed and after locking the brakes the auto would not skid the same distance each time (Rec. 238). One of the defendant's witnesses testified that he was a passenger on the car, that he looked out of the window and saw the auto 50 feet away and it was going as fast as the car. Another similar passenger saw the auto 25 feet away and it was standing still. It would be unreasonable to expect intelligent jurors to accept the evidence of such experts and of such inexperienced witnesses relative to the speed of the auto as against the testimony of experienced eye witnesses.

As an instance of the variation of the defendant's witnesses as to distances we call attention to another feature. It appears that the auto remained stationary where it landed after being hit, for several hours, and the several witnesses saw it and were asked to give its distance from the track. Their answers ranged from 8 feet (Record 124) to 30 feet (Record 133). This was really an immaterial

point, nevertheless it serves to show how unreliable the estimates of the skid marks are.

Again upon the subject of whistles from the train, some of the passengers on the car stated that they heard the crossing whistle after the car left Allentown. Others did not. While four witnesses of the plaintiff exclusive of the occupants of the auto, who were near the crossing, stated that they heard no whistles, and the defendant's principal witness stated that he only heard one signal after the car left Allentown, and as the motorman testified that he blew his whistle several times after he came in sight of the auto this must have been the whistle that Rosenberg heard.

In regard to the electric gong not ringing there were six witnesses for the plaintiff who were near the gong at and a moment before the collision who swore the gong did not ring. Some of the passengers on the car stated they heard it, others did not, but all who heard the gong were sure there was but one gong ringing. There was a gong on the car controlled by the motorman and it appears that the motorman rang this gong as he saw the auto (Record 215-216). This unquestionably was the gong that was heard.

II.

Our fourth specification which is based upon the ninth assignment of error, challenges the ruling of the court in permitting Mrs. Rininger, one of the plaintiffs, to be interrogated concerning the

amount of property that was left by the deceased to the plaintiffs.

It is apparent that this evidence was sought for the purpose of unfairly influencing the jury. The amount of the estate inherited by the plaintiffs would not enter into, nor affect the measure of recovery. If the plaintiffs had not inherited anything from the deceased, and had been destitute, it would not have been proper for the plaintiffs in error to have shown such fact to the jury.

Our fifth specification complains of the refusal of the court to permit the plaintiffs to offer evidence to the jury showing that 12 miles an hour is a reasonable and safe rate of speed for the automobile to approach and drive across a crossing. This evidence was excluded by the court upon the ground that it was for the jury to determine whether such speed was reasonable. It would appear that the jury should have some evidence from experienced men as to whether this was a reasonable or unreasonable rate of speed, and the court should not have assumed that all members of the panel were familiar with the operation, driving and control of automobiles, and he must have assumed this fact in order to reach the conclusion that the jury could determine the reasonableness of the rate of speed.

The court finally determined that it was not the duty of the jury to determine whether this rate of speed was reasonable, but that it was for the court to determine as a matter of law whether or not the deceased and his chauffeur approached the

crossing at a reasonable rate of speed and in order to do this he was obliged to determine at what rate of speed they were actually traveling. The evidence of the plaintiffs tended to establish one rate of speed, while the evidence of the defendant tended to show that the rate of speed was higher. This again was a disputed fact, and it was peculiarly the province of the jury to sift the conflicting evidence on this point and then ascertain the rate of speed.

The object of the plaintiffs in error in offering the excluded testimony was for the very purpose of meeting this contingency, and when the court excluded it on the ground that it was for the jury to determine whether or not the speed shown by the plaintiffs was reasonable, the plaintiffs had a right to assume that the question would in fact be left to the jury.

It may be urged that the court's final ruling assumed that 12 miles per hour was an excessive rate of speed to drive towards or upon the crossing and that we were not prejudiced by excluding this testimony, but the court had no right to determine as a matter of law that the speed of twelve miles was dangerous. There was no evidence that such a speed was dangerous and the court refused to admit evidence that it was reasonable (Rec. 47). If we were permitted to step outside of the record we could say that all experienced auto drivers would say that this was a reasonable rate of speed. Indeed, the testimony of defendant's expert witness

indicated that twelve miles per hour was a reasonable speed.

In two of the cases heretofore quoted by us the injured party was trotting his team as he neared the track. Practical experience demonstrates that an automobile running twelve miles per hour is as much under control as a trotting team. There is no rule by which it can be determined as a matter of law what is reasonable or an unreasonable rate of speed for an automobile to proceed toward or cross railroad tracks. In the very nature of things it should be the province of the jury to determine whether the speed was reasonable when considered in relation to all of the surrounding circumstances.

It may be urged that the court ignored all of the testimony of the plaintiffs as to this rate of speed and found that the deceased approached the crossing at 30 miles per hour. If this is true then it is clear that the court was wrong, for in weighing the evidence for a directed verdict he must accept the most favorable view of plaintiffs' evidence, and cannot determine which is the correct version of a disputed fact. Furthermore it would be unreasonable for the court to assume the speed was 30 miles. The only support for such a finding is the testimony of a farm hand with no knowledge of measurements, speed or automobiles, or a fourteen-year-old inexperienced country boy attempting to fix the speed of an approaching automobile, or the testimony of experts to give the rate of speed

from the skid marks, and which skid marks were assumed to be 39 feet long, and yet the most favorable testimony of the defendant show that the greatest possible length of the skid marks was only 26½ feet.

It is suggested by one witness that the skid marks appeared to be burned into the street and it is intimated that this is circumstantial evidence of excessive speed. The explanation of this appearance is simple. The highway had been macadamized some years before. A few weeks before the collision a new surface had been given it consisting of a tar and asphaltum composition. This was of the consistency of thick molasses and after being spread on the surface rock screening was sifted on it to absorb it. The heat of the sun would soften it so that it would ooze to the surface, then additional screening would be placed on it. This would occur during the entire season (Rec. 189). It is not surprising to find that when a heavy automobile skidded on this surface on a hot day that the skidding wheels would burrow into it.

Therefore the court committed error in refusing the admission of this testimony.

IV.

Our thirteenth assignment of error is based on the refusal of the court to permit the witness Hanford to testify concerning the plans that had been considered at the time the tracks of the defendant were built to eliminate or minimize the dangerous character of this crossing (Record 103).

If the defendant knew of the dangerous character of this crossing and if there was a reasonable plan which could be carried out at a reasonable expense by which the dangers of this crossing could be reduced if not entirely eliminated, then it was negligence on the part of the defendant to operate its cars thereon at a high rate of speed without adopting and carrying out such plans or maintaining suitable safeguards to protect the traveling public from the dangers of the crossing. This proposed evidence disclosed both knowledge of its dangerous character by the officers of the defendant and a reasonable plan to remedy it. This was evidence to prove negligence on the part of the defendant when considered with the other evidence that no flagman, gates or other means were maintained by the defendant to warn the public of peculiar and not readily observible conditions surrounding this crossing. The exclusion of this testimony was prejudicial error against the plaintiff.

We therefore respectfully submit that it was error on the part of the trial court to direct a verdict and enter judgment thereon against the plaintiff in error and that the cause should have been submitted to the jury to determine the issues between these parties and that this case should be reversed.

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